Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-842

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SHILEY INCORPORATED
Appellant,

VS.

JAMES FOGARTY CORRIGAN, BRETT JAMES CORRIGAN, AND SCOTT GRANT CORRIGAN,
Appellees.

On Appeal from the California Court of Appeal

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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15 pp

QUESTIONS PRESENTED

(As set forth in Jurisdictional Statement)

1. Whether a state appellate court may apply a standard patently inconsistent with this Court's decision in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), so as to reverse a lower court's exercise of discretion to stay proceedings on forum non conveniens grounds in a wrongful death/products liability action brought by foreign plaintiffs with regard to a product only exported in foreign commerce.

2. Whether a state appellate court may apply a rule which is hostile to federally-established principles of international comity so as to reverse a lower court's exercise of discretion to stay proceedings on forum non conveniens grounds in a wrongful death/products liability action brought by foreign plaintiffs with regard to a product only exported in foreign commerce.

STATEMENTS UNDER COURT RULES

(See statements under Court Rules set forth in Jurisdictional Statement.)

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Overview

1. The Plaintiffs Fail to Distinguish *Piper Aircraft Co. v. Reyno*. If *Reyno* Binds State Courts in International Products Liability Litigation, the Judgment Below Is Clearly Erroneous.

The facts of this case track those in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981) in all pertinent respects. Throughout their brief, plaintiffs and appellees Corrigan ("plaintiffs") rely on arguments which this Court already rejected in *Reyno.* For example, plaintiffs suggest that the "many" factors which may be considered in a forum non conveniens analysis effectively preclude this Court from determining whether the California appellate court erred in reversing the trial court's forum non conveniens order, notwithstanding the substantial weight which the appellate court gave to the absence of strict liability and the measure of damages in Australia. Motion to Dismiss or Affirm ("Motion") at 8-9, 25.

Reyno, however, held that the Third Circuit erred in both of its alternative holdings: its emphasis on the absence of strict liability and the limitations on damages in Scotland *and* its conclusion that the trial court abused its discretion in weighing the various forum non conveniens factors. *See Reyno,* 454 U.S. at 257-261.[1] As did the Third Circuit, the court below "substituted its own judgment" for that of the trial court. *See id.* at 257.

While plaintiffs omit the California Court of Appeal's acknowledgment of the "substantial disadvantage to defendant in the fact that other potential tortfeasors and witnesses are located in the alternative forum and may not be amenable to jurisdiction here" (A-19[2]), the only three affirmative factors which are claimed to favor a California forum were rejected in *Reyno*: (1) The disadvantage to plaintiffs from a change in substantive law (absence of strict liability in the foreign forum) (*cf.* 454 U.S. at 247); (2) Shiley's alleged obligation to litigate in California because of its California location (the *Reyno* defendants manufactured the aircraft in Pennsylvania and Ohio, *id.* at 239); and (3) California's alleged interest in regulating exports manufactured in California by awarding damages to deter products which do not meet California's standards (*cf. id.* at 260-261)[3] are not proper grounds for keeping this litigation from disposition in Australia. *Cf.* Motion at 8-9.

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[1]The dissenting opinion, which agreed that the Third Circuit's emphasis on the difference in substantive law was wrong, apparently viewed the "alternative" holding as inadequate; it would have remanded and required the Third Circuit to give further consideration to whether the trial court's decision was proper. 454 U.S. at 262 (Stevens, J., joined by Brennan, J.).

[2]"A" and "D" refer to respective appendices to the Jurisdictional Statements. The Joint Appendix submitted below is not yet before this Court. Nevertheless, Shiley in this brief will cite to that document as "JA."

[3]Indeed, the plaintiffs' argument is weaker here than in *Reyno* where the product was not exported directly but was originally sold "for use in the United States." *See Reyno v. Piper Aircraft Co.*, 479 F.Supp. 727, 729 (M.D.Pa. 1979).

The decision of the California appellate court must be reversed if reviewed under the *Reyno* standard. By emphasizing that the forum non conveniens decision determines the substantive law controlling the case and that California is retaining this litigation in order to regulate exports (through the deterrence effect of its liability standards), plaintiffs only highlight the substantial federal foreign commerce and relations questions which call for the application of federal common law established by *Reyno* and federal comity decisions.

Procedural Issues

2. Cal. Civ. Proc. Code § 410.30(a) Cannot Be an Independent and Adequate State Ground Because Its Validity As Applied Is the Very Question Raised on Appeal.

Plaintiffs' primary argument that Cal. Civ. Proc. Code § 410.30(a) is an independent and adequate state ground (Motion at 9-10) is completely without merit because the validity of that statute as applied is the very question raised on appeal. Jurisdictional Statement at 2-3.

3. The Federal Question Was Decided by the Court Below and Was Timely and Properly Raised.

Contrary to plaintiffs' assertion, Shiley does *not* concede "that the court below did not expressly pass on the question sought to be reviewed" (Motion at 10). Indeed, the California Court of Appeal expressly determined that *Piper Aircraft Co. v. Reyno* does not apply to forum non conveniens decisions in the California courts.[4] In the portion of the Jurisdictional

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[4]At pp. A-10/A-11, the court below stated:

> In its analysis of the difference between state and federal law after the United States Supreme Court decided *Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 250-251, the *Holmes* court stated that California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a forum non conveniens dismissal (*Holmes v. Syntex Laboratories, Inc., supra,* 156 Cal.App.3d at p. 381) than the federal rule announced in *Piper.* In *Piper* the United States Supreme Court said that the possibility of an unfavora-

Statement cited, but not quoted, by plaintiffs (*id.* at 2 n.3), Shiley stated that the court below did not expressly come to grips with the *merits* of Shiley's federal question challenge. Although the court below decided the federal question in favor of the validity of the California statute as applied, it failed to deal with the arguments against such a decision. The court below expressly acknowledged that Shiley's federal question challenges were made ("respondents urge that . . . decisions, including those handed down in federal court, mandate that the stay imposed by the trial court be upheld"). A-9. In short, the claims were "passed upon" *and* "pressed."[5]

Plaintiffs strain to argue that Shiley's reliance upon federal case authority was not always accompanied by citation to specific federal constitutional provisions before each court in the California system (Motion at 11-13), notwithstanding that "citation to book and verse" is unnecessary. *See Eddings v.*

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ble change in law is not relevant unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." (*Piper Aircraft Co. v. Reyno, supra,* 454 U.S. at p. 254.) The rationale stated for this finding was that since ordinarily "plaintiffs will select that forum whose choice-of-law rules are most advantageous[,] . . . if the possibility of an unfavorable change in substantive law is given substantial weight . . ., dismissal would rarely be proper." (*Id.* at p. 250.)

The *Piper* court observed that choice of law analysis would become extremely important and courts would frequently be required to interpret law of a foreign jurisdiction and would have to compare rights, remedies and procedures available in each forum, which forum non conveniens was designed to avoid. (*Id.* at p. 251.)

It is clear, however, that California courts have demonstrated a willingness to assume the burden of resolving conflict of laws problems and will not invoke forum non conveniens doctrine simply to avoid a choice of law analysis. (See *Brown v. Clorox Co., supra,* 56 Cal.App.3d 306, 313.)

[5]Plaintiffs' condensation of several pages of international comity argument into one sentence (Motion at 11-12) omits Shiley's citation of *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 446-454 (1979), *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 417-418 (1964), and *Vespa of America Corp. v. Bajaj Auto Ltd.,* 550 F. Supp. 224, 229 (N.D.Cal. 1982), as authority that comity principles which constrain international application of the federal antitrust laws also apply to state laws.

Oklahoma, 455 U.S. 104, 113 n.9 (1982). They claim they were deprived of adequate notice, although the purpose of raising a federal question is to provide the court below an opportunity to pass on the question. Nevertheless, Shiley served plaintiffs with papers which were submitted to the trial court in support of the motion, to the California Court of Appeal under Cal. R. Ct. 5.1, and to the California Supreme Court under Cal. R. Ct. 28(b), which included 197 pages of federal cases, statutes, and constitutional provisions. JA 219-399, 403-408, 681-689, 691. In any event, a challenge to the application of a state statute as repugnant to federal decisional law is a proper subject for appeal under 28 U.S.C. § 1257(2). *See* Wright, et al., 16 *Federal Practice and Procedure* § 4012 (1977).

Finally, that Shiley argued alternative state grounds in addition to federal grounds in support of its issues presented for review to the California Supreme Court was entirely appropriate (*see Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., dissenting in part) (preference for disposition on non-constitutional grounds)) and in no way impairs the preservation of the federal questions for presentation before this Court. To force Shiley to sacrifice its rights and contentions under state law in order to vindicate its consistent legal rights under federal law would be fundamentally unfair.

4. That the Trial Court's Forum Non Conveniens Order Took the Form of a Stay Rather Than a Dismissal Is Irrelevant.

Plaintiffs appear vexed that Shiley did not cross-appeal the decision of the trial court to issue its forum non conveniens order in the form of a stay rather than a dismissal. *See, e.g.,* Motion at i, 11. Section 410.30(a) provides for use of either form of forum non conveniens order. There is no distinction of any significance. The stay of proceedings on condition that plaintiffs may still bring their action in Australia (D-1) is not unlike the dismissal in *Reyno* which was conditioned on the defendants' submission to jurisdiction in Scotland and waiver of any statute of limitations defense (454 U.S. at 242), except

that a stay provides some procedural convenience to a plaintiff in resuming an action in the original forum in the unlikely event that the condition cannot be fulfilled.

Issues on the Merits

5. The 70-Degree Valve Was Only Exported.

The 70-degree valve was never sold or distributed in the United States. JA 434. Plaintiffs' contention that the 70-degree valve is the same as one of the other models of the Bjork-Shiley valve which opens to a 60-degree angle is contradicted by actions of the Food and Drug Administration which treated the valves differently. In April of 1979 the FDA issued premarket approval for commercial sale and distribution of the 60-degree valve in the United States. JA 22. Although the FDA approved export of the 70-degree valve to Australia, it never issued premarket approval for sale or distribution of the 70-degree valve in the United States. JA 434.[6] FDA standards for export approval are different from those for domestic premarket approval. JA 452-453; *see* Jurisdictional Statement at 15 n.13. Also, the altered quotation of the opinion below is misleading; the opinion does *not* state that the product was sold or distributed in California.[7] *Cf.* Motion at 6 *with* A-17; *see also* A-3.

6. Plaintiffs' Assertion That There Is No Personal Jurisdiction Over Shiley in Australia Is Both Erroneous and Irrelevant.

Plaintiffs' statement that they could only obtain personal jurisdiction over Shiley in California is completely without support. The statement is false because New South Wales,

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[6]The Bjork-Shiley "monostrut" valve, which also employs a convexo-concave disc opening to a 70-degree angle, still has yet to be approved for sale and distribution inside the United States. *See* JA 90.

[7]The opinion below compared the facts of this case to those in *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984), where the product was manufactured in the alternative forum (Great Britain) as well as sold and distributed in that country.

Australia, provides for jurisdiction over a foreign defendant in circumstances such as these. The pertinent law of New South Wales provides for jurisdiction over a foreign defendant where one of any number of different factors is present, including the following: (1) a tort is committed in the state; (2) damages are suffered wholly or partially in the state, irrespective of the site of the tortious act; (3) the defendant is ordinarily a resident in the state (this might include a corporation which maintains employees in New South Wales); or (4) the defendant submits to jurisdiction. New South Wales Supreme Court Rules 10.1(1)(d), (e), (f), and (h).[8]

Furthermore, plaintiffs' point is irrelevant. The forum non conveniens dismissal in *Reyno* was upheld notwithstanding that Scottish jurisdiction over the defendants was obtained by stipulation. *See* 454 U.S. at 242. If anything, the rationale for a foreign forum is stronger in the present case, where Shiley exported the valve directly to Australia, than in *Reyno,* where the defendant originally marketed the aircraft in Ohio "for use in the United States." *See* 479 F. Supp. at 729.

7. Plaintiffs Concede That California Is Intentionally Regulating Foreign Commerce.

Plaintiffs defend the decision of the court below with their claim that "California has an important interest in regulating products manufactured in California" (Motion at 9) or, as the court below also termed it, "California's interest in regulating the foreign marketing of defective products" (A-9). Plaintiffs contend that Australia's interest in the disposition of this litigation must give way to California's enforcement of its sense of "public morality."[9] Motion at 20, 23. Plaintiffs' posi-

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[8]With respect to the statutory basis for the New South Wales Supreme Court Rules, *see* New South Wales Supreme Court Act, 1970, §§ 122 *et seq.;* JA 539.

[9]Although plaintiffs obscure the distinction between California and federal policies with their references to the "morality" of FDA regulation, it should be noted that this is a private tort claim based on state common law and not a regulatory proceeding brought by the FDA. Again, Shiley acted with FDA approval. JA 217. Even though plaintiffs claim that

tion emphasizes that the exclusiveness of federal conduct of foreign relations and direct regulation of foreign commerce is here at stake.

Plaintiffs' contention that state tort claims are not preempted by FDA regulations is irrelevant and is not here at issue before the Court. The question is not whether *any* common law claim for compensation is available to the plaintiffs, but whether they have an absolute right to pursue their remedy under the laws of California rather than Australia. Indeed, the state tort claim in *Reyno* was presumably available but for the inconvenience of the American forum. The dismissal was predicated upon this Court's determination that the remedy available in Scotland (not unlike the remedy available in Australia) was adequate. 454 U.S. at 254-255.

The appellate court below did not decide to retain this litigation in California for the purpose of availing the plaintiffs of an adequate forum. The court's express intent was to regulate foreign commerce by deterring exports which do not meet California's products liability standards. A-9, A-15/A-16. For this reason, the court's rejection of the *Reyno* doctrine was an ultra vires usurpation of foreign commerce power granted exclusively to the federal government.

Reyno is binding in international products liability litigation regardless of whether a product is a subject of specific federal regulation. That FDA export approval is more readily available than domestic premarket approval only enhances the reasons for not creating a preference for litigating international cases under state rather than foreign law. *See* Jurisdictional Statement at 15 n.13.

Contrary to plaintiffs' claims (Motion at 19-20), the subsequent withdrawal of FDA export approval for the 70-degree

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negligence per se actions based on regulatory violations are not preempted by FDA regulations (Motion at 16), the availability of a strict liability theory is the purported basis for keeping this litigation in California. Furthermore, their complaint lacks the barest allegation of any regulatory violation. JA 1-10.

valve does not minimize the ex ante impact of this litigation on American high-technology exporters. The conduct structuring effect of this case will be shaped by the circumstances under which Shiley acted when it exported the valve. Subsequent withdrawal does not render this case unique, because FDA approval was intact when the valve was exported and implanted. JA 217, 463-464. Unless the decision below is reversed, exporters in California and other states cannot expect their products to be judged according to the public policies of the importing countries or the federal government, but must expect to be governed according to any of the various products liability laws of individual states. The foreign relations and commerce questions of this case are, therefore, substantial.

8. The Asserted Importance of Heart Valve Export Regulations Underscores the Need for a Uniform Federal Policy Binding on State Courts.

Plaintiffs strenuously urge that foreign governments depend upon the guidance of United States regulatory decisions. Motion at 20-21. Plaintiffs also argue the importance of regulating prosthetic heart valves, and that the sophistication of these devices requires regulation by an agency with superior expertise. Motion at 13-14, 20-21.

Plaintiffs hereby underscore the need for the United States to speak "with one voice." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). How can Australia rely on American guidance if it must sort out the disparate views of 51 different American jurisdictions (each with assorted "expert" jury determinations) as to which products are or are not unacceptably dangerous? Plaintiffs demonstrate why foreign commercial relations must be governed as a matter of federal law.

As for national policy, Congress enacted the Medical Device Amendments of 1976 and chose not to require domestic premarket approval for exports. 21 U.S.C. § 381(d). Congress did not enact Cal. Civ. Proc. Code § 410.30(a). As for Australian policy, it has accepted new technology imports.

Federal forum non conveniens and international comity doctrines must be controlling in international litigation, whether in federal or state court and whatever the substance of those doctrines. Only federal authority should determine when interference with the public policies of a foreign government is acceptable and what meaning must be ascribed to "Made in the *U.S.A.*"

January, 1987

Respectfully submitted,

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